SUPREME COURT, U. S.

SEP 6 1974

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-246

THE MONARCH INSURANCE COMPANY OF OHIO,
Petitioner

v.

DISTRICT OF COLUMBIA,
UNITED STATES OF AMERICA, ET AL.
Respondents

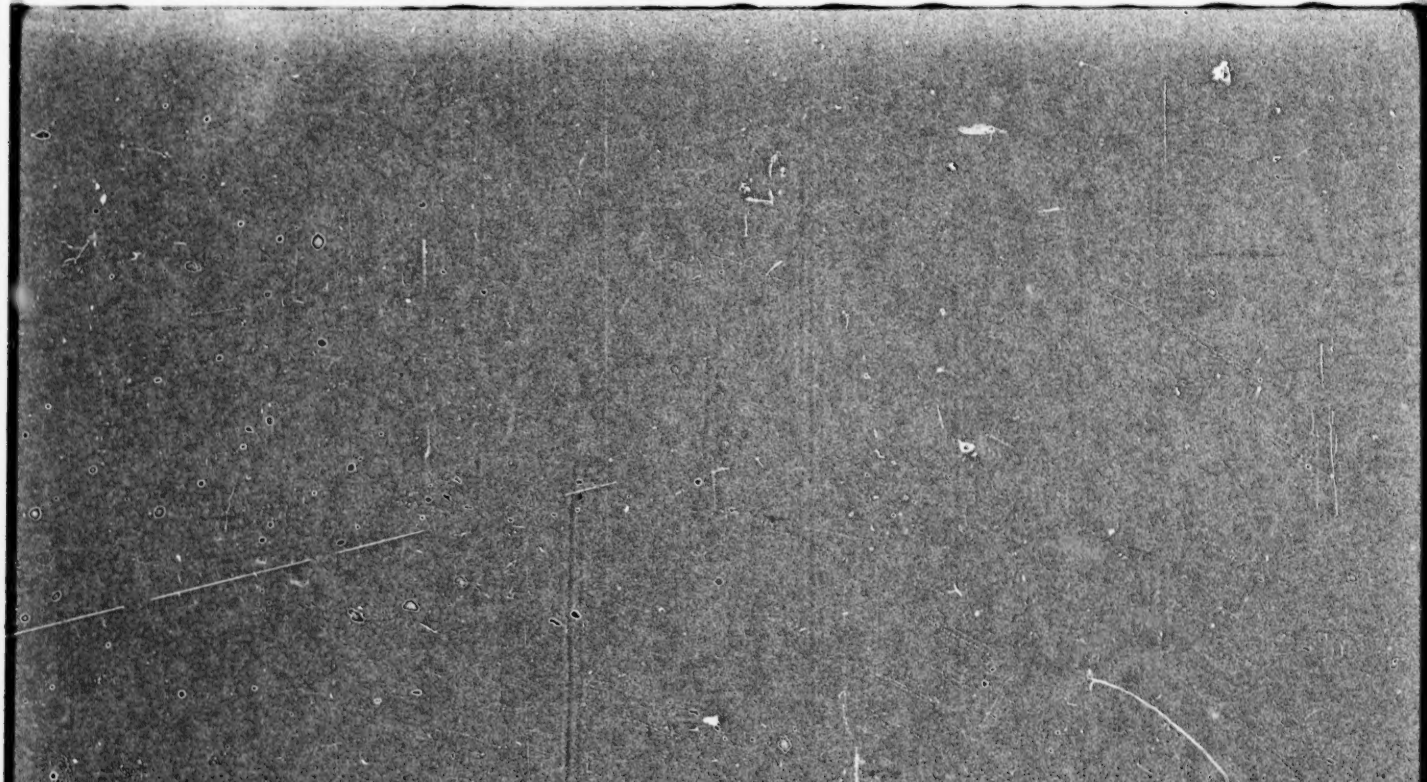
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DENVER H. GRAHAM
1314 19th Street, N.W.
Washington, D.C. 20036
Attorney for Petitioner

Of Counsel:

JOHN HARRISON BOYLES
600 New Jersey Avenue, N.W.
Washington, D.C. 20001

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.



SUBJECT INDEX

Page

A. Reference to Reports of Opinion Delivered in the Courts Below 1

B. Statement of the Grounds on Which the Jurisdiction of the Court Is Invoked 2

C. The Questions Presented for Review 2

D. The Constitutional Provisions and Statutes Which This Case Involves 4

E. Statement of the Case 4

F. The Basis for Federal Jurisdiction in the Courts of First Instance 8

Argument 8

Conclusion 12

TABLE OF CITATIONS

Cases:

Bivens v. *Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 619 (1971) 11
District of Columbia v. *Carter*, 409 U.S. 418 (1973) .. 7
The National Board of Young Men's Christian Associations v. *United States*, 395 U.S. 85 (1969) ..2, 6, 10, 11
Scheuer v. *Rhodes*, 416 U.S. 232 (1974) 2, 9
Westminster Investing Corp. v. *G. C. Murphy Co.*, 140 U.S. App. D.C. 247, 434 F.2d 521 (1970) 7

Constitution and Statutes:

Article IV, Section 4 ..... 5, 6
Fourth Amendment 11
Fifth Amendment 3, 4, 5, 6, 8, 9, 11
28 U.S.C. 1254(1) 2
28 U.S.C. 1346(a)(2) 3, 4, 8, 12
28 U.S.C. 1346(b) 7, 8, 9
28 U.S.C. 2671 8
42 U.S.C. 1983 ..... 5, 7
D.C. Code, Section 4-119 4
D.C. Code, Sections 1-102, 1-901, 11-521 8

Miscellaneous:

Dellinger, "Of Rights and Remedies: The Constitution as a Sword", 85 *Harv. L. Rev.* 1532 (1972) 12

Supreme Court of the United States

OCTOBER TERM, 1974

No. ———

THE MONARCH INSURANCE COMPANY OF OHIO,
Petitioner

v.

DISTRICT OF COLUMBIA,
UNITED STATES OF AMERICA, ET AL.
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

A. REFERENCE TO REPORTS OF OPINION DELIVERED IN THE COURTS BELOW

The decision of the United States Court of Appeals was rendered in a per curiam Judgment without opinion. This Judgment is reproduced in the Appendix to this Petition. The decision and opinion of the United States District Court, which the Court of Appeals affirmed, is reported at 353 Federal Supplement 1249. This opinion is set forth in the Appendix to this Petition.

B. STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

The Judgment of the Court of Appeals herein sought to be reviewed was made and entered on June 10, 1974. Petitioners, on June 10, 1974, filed with the Court of Appeals a "Petition for Rehearing En Banc", which that Court denied by order dated August 2, 1974.

This Court has jurisdiction to review the Court of Appeals' Judgment by writ of certiorari pursuant to Title 28, United States Code, Section 1254(1).

C. THE QUESTIONS PRESENTED FOR REVIEW

(This case and the cases consolidated with it in the courts below involve claims by insurance companies, as subrogees from their insureds, to recover payments they made for losses caused to their insureds during the April 1968 riots in the District of Columbia) (Petitioner's complaint in the District Court is set forth in the Appendix to this Petition, beginning at App. 28a).

1. Whether, particularly in view of this Court's recent decision in *Scheuer* v. *Rhodes*, 416 U.S. 232 (April 17, 1974), the Court of Appeals erred in not reversing the District Court's grant of respondents' motions to dismiss the complaints, on the ground that evidence in support of these allegations, or some of them, was essential to determine their legal sufficiency.

2. Whether, on the basis of the allegations in petitioners' complaints, this Court's decision in *The National Board of Young Men's Christian Associations*, v. *United States*, 396 U.S. 85 (1969), required the Court of Appeals to reverse the District Court's grant of respondents' motions to dismiss the complaints and to allow petitioners to produce evidence to support their

allegations that respondents' actions during the riots constituted a "taking" of private property for public use for which just compensation was owed under the Fifth Amendment of the Constitution.

3. Whether the Court of Appeals erred in not finding that the actions of respondents during the riots deprived the petitioners' insureds of their properties without due process of law and in violation of equal protection of the laws and whether the Court of Appeals erred in not finding that these allegations arise from and are "founded upon" the Constitution pursuant to Title 28, United States Code, Section 1346(a)(2) and therefore that sovereign immunity is not a good defense against them.

4. Whether the Court of Appeals erred in not finding that respondents were not immune on the basis of "discretionary function" from liability for their failure to perform, their negligently performing, and their deliberately not performing their legal duty to protect the properties and businesses of petitioners' insureds during the riots.

5. Whether the Court of Appeals erred in not finding that respondents had a duty at common law to compensate petitioners for the damage caused to the properties and businesses of their insureds during the riots.

6. Whether the Court of Appeals erred in not finding that respondents owed compensation to petitioners on the ground that respondents' actions created a nuisance which caused the loss of the properties and businesses of the petitioners' insureds.

7. Whether the Court of Appeals erred in not holding that the actions of the respondents resulted in inverse

condemnation for which payment for the property taken must be allowed.

8. Whether the Court of Appeals erred in not finding that the respondents could be held liable for negligently and carelessly performing or failing to perform their legal duty in accordance with D.C. Code Section 4-119, namely, to preserve the public peace, prevent crime and arrest offenders, to protect the rights of persons and property, and to provide proper police force at every fire in order to protect the firemen and property.

D. THE CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THIS CASE INVOLVES:

The Fifth Amendment of the United States Constitution:

". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation".

Title 28, United States Code, Section 1346(a)(2):

"(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * *

"(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded upon the Constitution, . . ."

E. STATEMENT OF THE CASE

This case, and the cases consolidated with it in the courts below, are suits by insurance companies, as subrogees from their insureds, to recover damages resulting from the loss of the properties and businesses of their insureds during the riots in the District of

Columbia that occurred in April of 1968 following the assassination of Doctor Martin Luther King, Jr. This case, as is true of all the others, was brought against the United States of America and the District of Columbia (but, unlike the others, it includes as additional defendants John B. Layton, Chief of the Metropolitan Police Department at the time of the riots, Walter E. Washington, Commissioner of the District of Columbia, and John and Mary Doe and Richard and Mary Roe, unknown citizens of the District of Columbia).

The complaints filed in this and all the other cases state the same basic theories of recovery, namely, liability for just compensation under the Fifth Amendment of the Constitution for the "taking" of private property for public purposes during the riots; liability for negligent and deliberate failure to perform the legal duty to protect private property during the riots; liability for riot damage under statutory and common law applicable in the District of Columbia; and liability for damages under the Due Process and Equal Protection clauses of the Constitution. (See App. 28a et seq.).

In addition, the complaints in some of the cases raise other theories of recovery, including liability under the Civil Rights Act, Title 42, U.S.C., Section 1983; liability on the ground that the riots constituted a nuisance; liability for failing to correct the social conditions that foreseeably caused the riots; liability for failing to protect the District of Columbia against "domestic violence" as required by Article IV, Section 4, of the Constitution; and liability based on inducing the insureds to rely upon defendants for protection against the riots and preventing them from adopting their own means of self-protection.

The respondents moved to dismiss all the complaints for failure to state a claim on which relief can be granted. The United States also moved, in the alternative, for summary judgment, and submitted voluminous affidavits and exhibits in support of that motion.

Petitioners opposed these motions by lengthy memoranda and a statement of facts in dispute filed in each case. Certain of petitioners also submitted evidentiary exhibits supporting their contention that there existed genuine issues of material fact.

The Opinion of the District Court, by District Judge William B. Jones, granted the respondents' motions to dismiss, but did not rule upon the United States' alternative motion for summary judgment.

Judge Jones considered all the respondents' theories of recovery. His rulings set forth in his Opinion may be summarized as follows:

1. The Due Process and Equal Protection claims add nothing to the complaint because the respondents have not given their consent to be sued for violating these provisions of the Constitution (App. 4a-9a).

2. There can be no recovery for violating Article IV, Section 4, of the Constitution because the President's discretion whether to use troops or militia to quell domestic violence is not reviewable (App. 9a).

3. There was no "taking" of private property for public use under the Fifth Amendment because, applying the tests of either the majority opinion or of Justice Harlan's concurring opinion in *National Board of YMCA* v. *United States*, 395 U.S. 85 (1969), there is no allegation that petitioners' insureds' properties were actually occupied by the government forces or that

those properties would have been safer without any protection by the troops or police. In any event, judgments on riot control involve unreviewable discretion by elected officials (App. 9a-11a).

4. The "discretionary function" exception under the Federal Tort Claims Act and its equivalent recognized with respect to the District of Columbia applies to immunize the respondents (App. 11a-18a).

5. The case of *Westminster Investing Corp.* v. *G. C. Murphy Co.*, 140 U.S. App. D.C. 247, 434 F.2d 521 (1970), is dispositive of the allegations that respondents had a legal duty to protect private property during the riots or that they owed compensation on any basis for damage caused by the riots (App. 18a-21a).

6. The allegation that respondents induced petitioners' insureds to depend upon them for protection against riots and prevented them from adopting their own means of self-protection and the allegation that respondents failed to remedy the social conditions that were the foreseeable causes of the riots are both within the discretionary and misrepresentation exceptions of the Federal Tort Claims Act and are not judicially recognizable causes of action against either the United States or the District of Columbia (App. 20a-21a, n. 13).

7. The decision of the United States Supreme Court in *District of Columbia* v. *Carter*, 409 U.S. 418 (1973), is dispositive of the petitioners' allegations under Title 42, U.S.C., Section 1983 (App. 3a-4a, 22a-23a).

Petitioners contended before the Court of Appeals and preserve for contention before this Court that each of these rulings is erroneous. Petitioners believe, however, that only the theories of their complaints that raise

constitutional issues, namely, Fifth Amendment "taking" and Due Process, will probably interest this Court under the standards for granting writs of certiorari indicated in Rule 19 of this Court's Rules. On this expectation, the balance of this petition will be devoted to these constitutional issues.

Timely appeals from Judge Jones' decision were taken to the United States Court of Appeals for the District of Columbia Circuit. Briefs and a Joint Appendix were filed and oral argument was had on June 3, 1974. By per curiam Judgment without opinion rendered on June 10, 1974, the Court of Appeals affirmed the District Court's judgments. On June 14, 1974, petitioners filed a Petition for Rehearing En Banc with the Court of Appeals, and that Petition was denied by order on August 2, 1974. Upon motion in the Court of Appeals, the mandate in all the cases consolidated in that Court has been stayed subject to this Court's final disposition upon the petition for writ of certiorari in this case.

F. THE BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The District Court had jurisdiction over this case by virtue of Title 28, United States Code, Sections 1346 (a)(2) and (b), and 2671; D.C. Code, Sections 1-102, 1-901, and 11-521; and the Constitution of the United States of America.

ARGUMENT

The decisions of the courts below call for this Court's exercise of certiorari jurisdiction because they ruled on federal questions in a manner in conflict with applicable decisions of this Court and they decided an impor-

tant question of federal law which has not been, but should be, settled by this Court.

1. The District Court granted the respondents' motions to dismiss the complaints, and the Court of Appeals sustained this ruling. Petitioners were thus deprived of any opportunity whatsoever of proving any of the allegations of their complaints.

In *Scheuer* v. *Rhodes*, 416 U.S. 232, (April 17, 1974), this Court reversed the action of a district court in granting a motion to dismiss on the ground that the public officials in that case (involving the Kent State shootings) were not absolutely immune from liability, but their immunity was qualified and depended upon what the evidence might show. This decision was brought to the attention of the Court of Appeals in these cases prior to oral argument and was stressed to the Court during oral argument. The Court nevertheless ignored the *Scheuer* decision in affirming the District Court's grant of respondents' motions to dismiss. The *Scheuer* case commanded that the complaints be viewed favorably to petitioners and that they must not be dismissed if their legal validity in any way depends upon what the facts might show. With respect particularly to petitioners' constitutional claims and their claims under the Federal Tort Claims Act and its equivalent basis of liability against the District of Columbia, petitioners' allegations on their face were legally sufficient to allow such proof.

2. In dismissing the allegation in petitioners' complaints that there was a compensable "taking" of private property for public purposes under the Fifth Amendment, the Court of Appeals and the District Court radically misconstrued and misapplied this

Court's decision in *The National Board of Young Men's Christian Associations* v. *United States,* 395 U.S. 85 (1969) (the "YMCA" case), so far the only case where this Court has decided this issue in the context of a riot.

The entire premise of both the majority opinion and Justice Harlan's concurring opinion in that case was that the facts there showed that, despite the petitioners' arguments to the contrary, the Army troops were trying to protect the petitioners' buildings. Indeed, the *YMCA* case arose on cross-motions for summary judgment on the basis of stipulated facts. The petitioners in that case made the same argument which petitioners here are making—that the troops did not act to protect private properties, but used them strategically as part of a defense of the Canal Zone (or, here, the District of Columbia). This Court did *not* reject this argument because it was legally invalid, but because:

> "The stipulated record, however, does not support petitioners' factual premise; rather, it demonstrates that the troops were acting primarily in defense of petitioners' buildings" (395 U.S., at 90).

From this, it clearly appears that this Court would have held for the petitioners in the *YMCA* case if the stipulated facts had not refuted their contention. This Court at least accepted the legal sufficiency of that contention. Petitioners in the present case raise a similar contention—that the troops and police did not act to protect the properties of petitioners' insureds during the riots. Petitioners allege (App. 31a-32a, 37a-38a) that, in accordance with plans made beforehand, respondents cordoned off the riot disturbance areas and

permitted the destruction and sacrifice of the private properties in those areas for public purposes. Fairly read, these allegations charge that respondents did not act to protect the insured's properties, but that they sacrificed them to destruction at the hands of the rioters and, by cordoning off the areas, they subjected these properties to greater destruction than might otherwise have occurred. The *YMCA* case therefore clearly requires that petitioners be allowed to prove these allegations of a "taking" under the Fifth Amendment.

3. Petitioners' complaints allege that respondents' actions during the riots deprived their insureds of their properties without due process of law and in violation of equal protection of the laws (in a manner included in the concept of "due process") secured by the Fifth Amendment of the Constitution. The District Court, sustained by the Court of Appeals, held that this cause of action must be dismissed because respondents had not given their consent to be sued for such cause of action.

On this point, the District Court, again as affirmed by the Court of Appeals, distinguished this Court's decision in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 619 (1971), principally on the ground that the suit was against federal officials under the Fourth Amendment and was not, as here, against the Government itself. These cases therefore present to this Court an opportunity to rule upon the important question whether the rationale of the *Bivens* case should be extended to recognize that a cause of action under another equally important part of the Bill of Rights may arise directly from the Constitution and may lie against the United States and

the District of Columbia as "founded upon" the Constitution under the jurisdictional statute, Title 28, U.S. Code, Section 1346(a)(2). At least one prominent constitutional scholar persuasively urges this extension. Dellinger, "Of Rights and Remedies: The Constitution as a Sword", 85 *Harvard Law Review* 1532 (1972), at 1557-8, 1564.

CONCLUSION

On the basis of the foregoing, petitioners respectfully urge this Court to grant this petition for writ of certiorari.

DENVER H. GRAHAM
1314 19th Street, N.W.
Washington, D.C. 20036
Attorney for Petitioner

Of Counsel:

JOHN HARRISON BOYLES
600 New Jersey Avenue, N.W.
Washington, D.C. 20001

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

(Filed June 10, 1974)

No. 73-1451

THE MONARCH INSURANCE COMPANY OF OHIO, *Appellant*

v.

DISTRICT OF COLUMBIA, a Municipal Corporation, *et al.*
[and listing all the consolidated cases]

Appeals from the United States District Court
for the District of Columbia

Before: Bazelon, Chief Judge, Tamm, and Leventhal,
Circuit Judges

Judgment

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia and were argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 13(c). On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the judgment and order of the District Court appealed from in these causes are hereby affirmed on the basis of the opinion of the District Court, (William B. Jones, District Judge). See also *Westminster Investing Corp.* v. *G. C. Murphy*, 140 U.S. App. D.C. 247, 434 F.2d 521 (1970).

Per curiam

For the Court
HUGH E. KLINE
Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1152-69

THE MONARCH INSURANCE COMPANY OF OHIO, *Plaintiff*

v.

DISTRICT OF COLUMBIA, UNITED STATES OF AMERICA, ET AL., *Defendants*

Opinion

(Filed Jan. 22, 1973)

This civil action, along with several others which have been consolidated with it before this Court, arises from the civil disturbances which followed the assassination of Dr. Martin Luther King in April 1968. Plaintiff, a corporation primarily engaged in writing and issuing fire, extended coverage and other policies of insurance, paid claims to several of its insureds as a result of riot damage and is consequently subrogated to those claims which it asserts in this case. Defendants are The United States of America; The District of Columbia; Walter E. Washington, Commissioner of the District of Columbia; John B. Layton, who at the time in question was Chief of the Metropolitan Police Department of the District of Columbia; John Doe, Mary Doe, Richard Roe and Mary Roe, unknown citizens of the United States and residents of the District of Columbia.

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1343, 1346(a)(2), 1346(b), 2671, et seq. (1970) and D.C. Code § 11-521 (1967 ed.). Defendant United States of America has moved to dismiss the action for failure to state a claim upon which relief can be granted or in the alternative for summary judgment; defendants District of Columbia, Walter E. Washington, and John B. Layton have moved to dismiss for failure to state a claim upon which relief can be granted.

Plaintiff's complaint in several counts alleges essentially that the United States and the District of Columbia were negligent in their preparation and implementation of plans to suppress any riot or civil disturbance in the District of Columbia, and that their delay in sending in police and troops and their failure to assign forces properly constituted negligence and a taking of plaintiff's property* under the Fifth Amendment as well as a denial of the equal protection of the laws. Plaintiff bases its cause of action against the United States, the District of Columbia and the named officials of the District of Columbia on the following grounds: (1) violation of 42 U.S.C. § 1983 (1970); (2) violation of the Fifth and Fourteenth Amendments to the United States Constitution in that defendants' actions constituted a taking of its property for public use without just compensation and a denial of due process and of the equal protection of the laws; and (3) violation of a common law duty to protect plaintiff's property and to compensate it for losses resulting from civil disorders.

Against the United States alone, plaintiff asserts a cause of action under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671, et seq. (1970), and under Article IV, Section 4 of the United States Constitution for the alleged negligent failure to protect the District of Columbia "against domestic violence." Each of plaintiff's claims will be treated separately below.

I. Claims Against the United States

In Count I of its complaint, plaintiff alleges that during twelve days of civil disorders in April, 1968, "all Defendants deprived Plaintiff's subrogors of their rights, privileges and immunities secured by the Constitution and laws

---

* Plaintiff's property, as referred to in this opinion, is the property of plaintiff's insureds which was destroyed in the riots. The plaintiff actually asserts its claims as subrogee by reason of its payments to its insureds under its policies.

in violation of 42 U.S.C. § 1983, and are liable for redress of damages therefor." By its terms, however, 42 U.S.C. § 1983 (1970) is inapplicable in suits against the United States.[1] That statute provides a remedy against *persons* acting under color of *state* authority and does not provide redress against the United States. *Monroe* v. *Pape,* 365 U.S. 167 (1967); *Davis* v. *United States,* 439 F.2d 1118 (8th Cir. 1971); *Norton* v. *McShane,* 332 F.2d 855 (5th Cir. 1964), *cert. denied,* 380 U.S. 981 (1965); *Broome* v. *Simon,* 255 F.Supp. 434, 440 (E.D.La. 1966).

Counts II and VIII of plaintiff's complaint allege a violation by the United States of the Fifth and Fourteenth Amendments on the ground that the actions taken by the United States during the civil disorders in the District of Columbia constituted a taking of plaintiff's property for public use without just compensation and a denial of due process and of the equal protection of the laws. Each of those allegations will be examined separately.

The equal protection clause of the Fourteenth Amendment applies only to discriminatory state action and not to actions taken by the United States (or the District of Columbia), which are governed by the due process clause of the Fifth Amendment. See *Bolling* v. *Sharpe,* 347 U.S. 497 (1954). Although plaintiff's complaint alleges a denial of due process as well as a denial of the equal protection of the laws, its claim of a denial of due process arises from its claim that the actions of the United States constituted a taking of plaintiff's property for public use without just

---

[1] 42 U.S.C. § 1983 (1970) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

compensation. That is the force of the allegation in Count VIII of plaintiff's complaint, which states that:

> The defendants, United States of America and the District of Columbia, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, did effectively take the property of plaintiff's subrogors for public use without just compensation and did deprive them of real and personal property without due process of law.

But if plaintiff's claim of denial of due process arises solely from its claim of a "taking" without just compensation, plaintiff has a recognized cause of action under the Tucker Act, 28 U.S.C. § 1346(a)(2),[2] and a claim of denial of due process based on the same matter is superfluous.

In Part V of plaintiff's memorandum in opposition to the motion of the United States to dismiss or in the alternative for summary judgment, plaintiff contends that:

> "... defendant's failure to protect, and its deliberately not protecting, the insureds' properties and businesses in accordance with its legal duty to do so, deprived the insureds of their property without due process of law and, in contrast to cases in which the defendant, on the same or on other occasions, effectively acted to protect private property, deprived the insureds also of their right to equal protection of the

---

[2] 28 U.S.C. § 1346(a)(2) provides:

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * *

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

The Court of Claims has exclusive jurisdiction of such claims in excess of $10,000. 28 U.S.C. § 1491 (1970).

> laws, all in violation of the Fifth and Fourteenth Amendments to the Constitution." Plaintiff's Memorandum at 43-44.

But such a claim of denial of due process and of equal protection of the laws is actually founded on some "negligent or wrongful act or omission," 28 U.S.C. § 2671 (1970), which gives rise to a cause of action under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671, et seq. (1970), and again a constitutional claim based on the same matter is superfluous.

Plaintiff contends nevertheless that

> "the due process and equal protection clauses define substantive *rights* in that they measure defendant's constitutional *duties*, and that plaintiff has a *cause of action* to recover damages for defendant's violation of these 'federally protected rights' by virtue of the jurisdictional statutes cited in the complaint, namely, Title 28, United States Code, Section 1346(a) and Section 1346(b) . . . ('negligent or wrongful act or omission')." Plaintiff's Memorandum at 44.

Again plaintiff links its constitutional claims to recognized causes of action authorized by Congress in 28 U.S.C. §§ 1346(a)(2) and 1346(b) (1970). Plaintiff, however, reads into 28 U.S.C. § 1346(a)(2) a cause of action against the United States for damages based on the violation of any constitutional provision.[3] In light of that position and in light of this Court's finding, set out more fully below, that the plaintiff has not shown a taking of its property by the United States without just compensation and that the plaintiff's claim under the Federal Tort Claims Act must fail by reason of the discretionary function exception under 28 U.S.C. § 2680(a) (1970), it should be made clear that plaintiff under the circumstances of this case has no independent cause of action for damages against the United States based upon a claim of violation of the due process and equal protection clauses of the Constitution.

---

[3] See note 2, *supra*.

A suit to recover damages suffered as a result of a denial of a constitutional guarantee can be brought against the United States only if a cause of action has been created by Congress. Because the sovereign is immune from suit absent its consent to suit, federal jurisdiction is lacking in suits not based upon a Congressionally created cause of action. As the court stated in *Laycock* v. *United States,* 230 F.2d 848 (9th Cir.), *cert. denied,* 351 U.S. 964 (1956):

> "It is axiomatic that: 'Consent alone gives jurisdiction to adjudge against a sovereign.' . . . This is so, even in cases grounded upon alleged violations by the Government of Federal constitutional rights." Schillinger v. U. S., 155 U.S. 163, 168 (1894). 230 F.2d at 850.

Cf. Bell v. *Hood,* 71 F.Supp. 813 (S.D. Calif. 1947), *on remand from* 327 U.S. 678 (1946); *U. S.* v. *Faneca,* 332 F.2d 872 (5th Cir.) *cert. denied,* 380 U.S. 971 (1964); *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 409 F.2d 718 (2d Cir. 1969), *rev'd* 403 U.S. 388 (1971).

In *Bivens, supra,* the Supreme Court recently held that federal courts have the power, even in the absence of a federal statute specifically authorizing such a cause of action, to award damages to an individual in a suit against federal agents based upon a violation of the Fourth Amendment's restriction against unreasonable searches and seizures. Because the Court of Appeals had not ruled on the question of immunity of the federal agents from liability by virtue of their official position, the Supreme Court did not reach that question. On remand, the Court of Appeals held that federal agents enjoy no official immunity from suits in federal courts for tortious activity in the execution of a search or arrest. 456 F.2d 1339 (2d Cir. 1972). It should be noted that on remand the Court of Appeals ruled only on the issue of official immunity—it did not decide

whether the Government should be liable on the common law theory of *respondeat superior* for the constitutional torts of its agents.[4]

Thus, the instant case must be distinguished from the *Bivens* case on the ground that plaintiff here brought its suit not against federal agents but against the United States, which remains immune from suit except in those limited situations in which consent to suit has been authorized by a statute of Congress.[5] Plaintiff's claims against

---

[4] Since the Supreme Court, as was noted above, did not reach the question of official immunity, it did not of course consider the related question of the vicarious liability of the United States Government for the constitutional torts of its agents. Mr. Justice Harlan, however, in his opinion concurring in the judgment of the Court, remarked: "However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit." 403 U.S. at 410.

[5] The situation in *Bivens, supra,* must be distinguished from that in the instant case on two other grounds. First, legislative and judicial efforts to protect Fourth Amendment rights have been unique. Both the majority and concurring opinions in *Bivens* stress the inadequacy in many cases of remedies other than federal damage actions in vindicating Fourth Amendment rights. Neither the exclusionary rule nor the availability in certain instances of injunctive relief, criminal sanctions, or state causes of action in damages has been sufficient to deter unreasonable searches and seizures. Thus, the question, as Mr. Justice Harlan sees it, is "whether compensatory relief is 'necessary or appropriate' to the vindication of the interest asserted." 403 U.S. at 407. Second, the search and arrest activities of the federal agents complained of in *Bivens,* unlike the riot control activities of the military and police in the instant case, have been held to be "ministerial" rather than discretionary and thus not protected from potential liability in an action for damages. *Bivens* v. *Six Unknown Named Agents of Federal Bur. of Narcotics,* 456 F.2d 1339 (2d Cir. 1972), *on remand from* 403 U.S. 388 (1971); *Carter* v. *Carlson,* 144 U.S. App. D.C. 388, 447 F.2d 358 (1971), *rev'd on other grounds sub nom., District of Columbia* v. *Carter,* 41 U.S.L.W. 4127 (U.S. Jan. 10, 1973).

the United States of a denial of due process and equal protection of the laws, therefore, add nothing to its complaint, and its cause of action in the circumstances of this case must be adjudicated within the provisions of the Tucker Act, 28 U.S.C. § 1346(a)(2) and the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671, et seq. (1970).

What has been said above about plaintiff's claim of denial of due process and equal protection of the laws applies with equal force to its allegation that the United States violated Article IV, Section 4 of the Constitution in its alleged negligent failure to protect the District of Columbia against domestic violence. In addition, it is clear from the constitutional and statutory framework, Article II, Section 2; Article IV, Section 4; 10 U.S.C. §§ 331-34 (1970), that the decision whether to use troops or the militia (National Guard) in quelling a civil disorder is exclusively within the province of the President. The Courts also have made it clear that presidential discretion in exercising those powers granted in the Constitution and in the implementing statutes is not subject to judicial review. *Luther* v. *Borden*, 48 U.S. (7 How.) 1 (1848); *Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19 (1827); *Alabama* v. *United States*, 373 U.S. 545 (1963).

In *National Board of Young Men's Christian Ass'ns* v. *United States*, 395 U.S. 85 (1969), the Court held that the Fifth Amendment did not require that a private party be compensated for damages to its buildings resulting from misconduct by rioters following occupation of the buildings by government troops. In so holding, the Court applied the following test:

> Where, as here, a private party is the particular intended beneficiary of the governmental activity, 'fairness and justice' do not require that losses which may result from that activity 'be borne by the public as a whole,' even though the activity may also be intended incidentally to benefit the public. See *Armstrong* v.

> *United States,* [364 U.S. 40, 49 (1960)], *United States* v. *Sponenbarger,* [308 U.S. 256, 266 (1939)]. 395 U.S. at 92.

Mr. Justice Harlan, in his opinion concurring in the result in the *YMCA* case, noted the ambiguity of the phrase "particular intended beneficiary," and stated that he did not disagree with the language of the Court quoted above,

> . . . if it means that the Fifth Amendment does not apply whenever the policing power reasonably believes that its actions will not increase the risk of riot damage beyond that borne by the owners of unprotected buildings. 395 U.S. at 97.

Mr. Justice Harlan's proviso to the formula applied by the Court in *YMCA* restated the general principle which he set forth at the outset of his concurring opinion:

> . . . it appears to me that, in riot control situations, the Just Compensation Clause may only be properly invoked when the military had reason to believe that its action placed the property in question in greater peril than if *no* form of protection had been provided at all. 395 U.S. at 95 (emphasis in original).

Mr. Justice Harlan concluded that:

> . . . it is for the Congress, not this Court, to decide the extent to which those injured in the riot should be compensated, regardless of the extent to which the police or military attempted to protect the particular property which each individual owns. 395 U.S. at 96.

In contrast to the *YMCA* case, there is in the present case no allegation that plaintiff's property was ever actually occupied by government forces. Nor does plaintiff assert that its property would have been safer with no protection provided by troops and police; on the contrary, plaintiff alleges that the protection afforded by the government was too little, too late. Therefore, under either formula for recovery of compensation set forth in the *YMCA*

case, that of the majority which provides that compensation can be claimed only for the *increased* damage resulting from the troops' presence (395 U.S. at 93), or that of Mr. Justice Harlan, which provides that compensation can be recovered only where the military action placed the property in greater peril than if *no* form of protection had been provided at all, plaintiff's allegations in the instant case do not set forth any ground for recovery of compensation from the government based on a taking of property for public use.

Plaintiff's allegations that the riot control program formulated and adopted by officials of the United States and the District of Columbia intentionally sacrificed private property in disturbance zones in order to further the public purpose of disturbance control, likewise do not establish a Fifth Amendment taking of property for public use without just compensation. Plaintiff contends that the public purposes for which its property was sacrificed include specifically: (1) protection of government buildings and private property in various areas by sealing off riot-torn areas and giving free rein to arsonists and looters in those areas; (2) prevention of serious injury or death to persons in those disturbance zones; and (3) protection of police, fire and military personnel. But judgments about where troops or police should be stationed and what degree of force should be exerted to provide adequate protection for persons and property in riot control situations are precisely the judgments which in the opinion of Mr. Justice Harlan, concurring in the judgment of *YMCA*, "are best left to officials directly responsible to the electorate." 395 U.S. at 95.

Plaintiff contends that the United States is liable in damages under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671, et seq. (1970), for the losses suffered by plaintiff as a result of the alleged negligence of the government in formulating and implementing its riot control

activities.[6] The Federal Tort Claims Act, however, specifically excepts from its coverage:

> Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. 28 U.S.C. § 2680(a) (1970).

The leading interpretation of the discretionary function exception is to be found in *Dalehite* v. *United States,* 345 U.S. 15 (1953), where the Court stated:

> It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the 'discretionary function or duty' that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications, or schedules of operations. Where there is room for policy judgment and decision there is discretion. 346 U.S. at 35-36.

In *Dalehite,* suit was brought against the United States under the Federal Tort Claims Act for damages resulting from a disastrous explosion of ammonium nitrate fertilizer, produced by the United States for export to occupied countries at the close of World War II. The District Court in that case found that the explosion resulted from negligence on the part of the Government in adopting the fertilizer

---

[6] 28 U.S.C. § 1346(b) provides, in pertinent part:

. . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

program as a whole, in its control of various phases of manufacturing, packaging, labeling, and shipping the product, in failing to give notice of its dangerous nature to persons handling it, and in failing to police its loading on shipboard. The Supreme Court held that the acts of negligence found by the District Court did not subject the Government to liability:

> The decisions held culpable were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the Government's fertilizer program. 346 U.S. at 42.

Plaintiff argues that the *Dalehite* case "has been overturned or significantly 'modified' by later Supreme Court cases," citing *Indian Towing Co.* v. *United States,* 350 U.S. 61 (1955), *Rayonier, Inc.* v. *United States,* 352 U.S. 315 (1957).

In *Indian Towing Co.,* suit was brought against the United States under the Federal Tort Claims Act, seeking recovery for damages alleged to have been caused by the negligence of the Coast Guard in the operation of a lighthouse. The question in that case, as the Court stated it, was one of "liability for negligence at what this Court has characterized the 'operational level' of governmental activity. *Dalehite* v. *United States,* 346 U.S. 15, 42." The Government in fact conceded that the discretionary function exception of 28 U.S.C. § 2680(a) was not applicable to its activities in operating lighthouses, but the Government contended that:

> the language of § 2674 (and the implications of § 2680) imposing liability 'in the same manner and to the same extent as a private individual under like circumstances . . .' must be read as excluding liability in the performance of activities which private persons do not perform. Thus, there would be no liability for negligent performance of 'uniquely governmental functions.' 350 U.S. at 64.

The Court rejected the Government's position and held that the Federal Tort Claims Act does not impliedly incorporate the distinction between "governmental" and "non-governmental" functions which, in the opinion of the Court, has caused confusion in the law of municipal liability for torts. The mere fact that the Coast Guard operates all or most lighthouses renders that activity "governmental," in a manner of speaking, but that in no way removes the activity from the "operational level." With regard to such activity, the Court concluded:

> The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order. . . . 350 U.S. at 69.

The Court in *Indian Towing Co.*, therefore, left intact the *Dalehite* distinction between discretionary and operational governmental activity, and it did not question the conclusion in *Dalehite* that the government's decisions in that case involved policy judgments at the planning level directly related to the political objective of providing food in occupied countries, in order to satisfy its obligations as an occupying power.[7]

In *Rayonier, supra*, suit was brought against the United States under the Federal Tort Claims Act, seeking to recover damages caused by the alleged negligence of employees of the Forest Service in fighting a fire. Again, the Court was dealing with governmental activity entirely at the operational level. The Forest Service had entered into an agreement with the State of Washington to protect against and to suppress any fires in an area which included the public lands where the fires started and adjacent lands

---

[7] 346 U.S. at 19. The Court cited the United States' obligations under The Hague Conventions of 1899 (II) and 1907 (IV) Respecting the Laws and Customs of War on Land, Article 43.

privately owned. The owners of the adjacent private lands were aware of the contract and relied on the Forest Service to control and put out any fires in the area covered by the agreement.

As in *Indian Towing, supra,* the Court in *Rayonier* held that in determining the liability of the United States for negligence in performing these activities at the operational level, the United States must be considered as a "private person" and not a municipal corporation for purposes of applying "the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). 352 U.S. at 318. Again, the Court in *Rayonier* did not, as plaintiff argues, "overturn" or "significantly modify" the *Dalehite* distinction between discretionary and operational activity or the Court's conclusion in *Dalehite* that the government's activity there involved policy judgments at the planning level.

Plaintiff contends that the Government in the instant case really had no discretion at all in carrying out its obligation to restore order in the civil disturbances in question here. As plaintiff would have it, the Government "agreed" to assume a legal duty imposed upon it by "statutes and otherwise."[8] to protect private property and engendered reliance upon such protection on the part of property owners. Thus governmental activity in quelling a riot would be entirely operational and subject to the same standard of care as if the government were merely operating a lighthouse or putting out a forest fire.

Such an interpretation of the scope of governmental discretion in formulating and implementing a riot control program is unreasonably narrow and artificial. Policy considerations directly related to objectives which are, in

---

[8] Plaintiff reasons that the legal duty to protect property is assumed by the United States as the governmental entity both for the nation as a whole and for the District of Columbia, and arises from such statutes as D.C. Code §§ 4-119, 4-126, and 4-143; and from common law as well.

the strictest sense of the term, governmental or political pervade every phase of planning and executing a riot control program. Such considerations point not only to discretionary functions free from liability under the Tort Claims Act but to political questions which are beyond the jurisdiction of this Court. Among the matters of policy suggested in the government's brief in support of its motion to dismiss are the following:

1. Presidential use of military power under Article II, Section 2; Article IV, Section 4; and 10 U.S.C. §§ 331-334 (1970);[9]

2. Military manpower and operations in the United States and abroad as affected by simultaneous disturbances in several American cities;

3. Military preparedness for and expertise in riot control tactics;

4. Foreign relations, as affected by civil disturbance in the United States and the use of military force to suppress it;

5. Federal-state relationships, as affected by excessive reliance on federal forces and the threat to the safety of the nation's capital.

The presence of similar policy considerations led the Court to deny relief in *Smith* v. *United States*, 375 F.2d 243 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967). In that case, plaintiff, a grocery store owner, had been a juror in a controversial civil rights case in Georgia. He alleged a conspiracy on the part of civil rights militants to retaliate against him by injuring his business through a group boycott and sought recovery against the Government for the

[9] As was noted above, Presidential discretion in exercising the powers granted in Art. II, Sec. 2; Art. IV, Sec. 4, and 10 U.S.C. §§ 331-334 (1970), is not subject to judicial review. *Luther* v. *Borden, supra; Martin* v. *Mott, supra; Alabama* v. *United States, supra.*

alleged negligent failure of the FBI to investigate and of the United States Attorney to prosecute the militants. He argued that there is an affirmative duty on the part of the Government to investigate and prosecute crime and that, when there is a "clear violation" of a federal statute, the discretionary function exception is inapplicable. The Court, however, affirmed the granting of the Government's motion to dismiss, basing its decision on the section 2680(a) discretionary function exception to the Tort Claims Act. The basis of the Court's holding was that the decision whether to prosecute or not may involve matters of policy apart from the question of probable cause and if that decision were not held in every case to be absolutely discretionary, it "might be influenced by a plaintiff with no governmental responsibility." 375 F.2d at 247.

> Another holding could diffuse the government's control over policies committed to it by the Constitution, and irrationally concentrate political responsibility in fortuitous lawsuits.
>
> Whatever else § 2680(a) may do, its discretionary function exception prevents this diffusion of governmental power into private hands. The United States is immune from liability in the present case not because of the mere fact that government officials made choices, but because the choices made affected the political (not merely monetary) interests of the nation. The Act is intended to spread monetary losses in certain cases among the taxpayers; it is not intended to affect the distribution of political responsibility. 375 F.2d at 248.[10]

---

[10] *See also United States* v. *Fancca*, 332 F.2d 872 (5th Cir. 1964), *cert. denied*, 380 U.S. 971 (1965); but *cf. Swanner* v. *United States*, 275 F.Supp. 1007 (M.D. Ala. 1967), *rev'd on other grounds*, 406 F.2d 716 (5th Cir. 1969). Swanner had been an informer for the Government, and as a result of his information indictments had been brought against certain individuals who had allegedly threatened him. Three days before the scheduled trial of the individuals involved, Swanner's house was bombed, injuring him and several other members of his family. The Court held that the

Finally, Mr. Justice Harlan's remarks in *YMCA, supra,* quoted above, with regard to claims based upon "inadequate" protection by the government in riot situations, are just as pertinent in the context of the Federal Tort Claims Act as they are in the context of the Tucker Act. As Mr. Justice Harlan concluded:

> . . . it is for the Congress, not this Court, to decide the extent to which those injured in the riot should be compensated. . . . " 395 U.S. at 96.[11]

Plaintiff contends that the United States has a duty, arising from the common law and ancient English statutes as part of the common law, to compensate plaintiff for its losses suffered as a result of civil disturbances. This duty, plaintiff argues, is epitomized in the notion of the "social contract" between the state and its citizens to preserve social order and the property of the citizens against mob violence. The answer to plaintiff's contention is that,

> . . . in the absence of legislation, municipalities and other governmental bodies are not pecuniarily responsible for destruction and injury wreaked by rioting mobs. See Louisiana ex rel. Folsom v. Mayor

---

United States had a special duty to Swanner arising from the informer relationship and that its decision not to provide protection under such circumstances did not come within the discretionary function exception to the Federal Tort Claims Act. The Court cited *United States* v. *Muniz*, 374 U.S. 150 (1963); *In re Quarles*, 158 U.S. 532 (1895); *Cohen* v. *United States*, 252 F.Supp. 679 (N.D. Ga. 1966); and *Shuster* v. *City of New York*, 5 N.Y.2d 75, 180 N.Y.S.2d 265, 154 N.E.2d 534 (1958).

[11] It should be noted that after the decision in *Dalehite, supra,* compensation by means of a private relief bill was granted to individuals injured as a result of the Texas City disaster. Claims which had been covered by insurance, however, were excluded. Act of August 12, 1955, 69 Stat. 707, Sec. 6.

After the 1968 civil disturbances, proposed legislation was introduced in Congress to provide compensation for injuries suffered by individuals as a result of criminal activity, but Congress has enacted no legislation to this effect. *See, e.g.,* Senate Bill No. 9, 91st Cong. and Senate Bill No. 2155, 89th Cong.

> and Administrators of New Orleans, 109 U.S. 285, 287-288 (1883); Turner v. United States 248 U.S. 354, 357-358 (1919). . . . No reported case holds a governmental body liable in these circumstances, or indicates that there could be liability without a statute or ordinance. All the statements by courts are the other way. *Westminster Investing Corp.* v. *G. C. Murphy Co.*, 140 U.S. App. D.C. 247, 249, 434 F.2d 521, 523 (1970).

Plaintiff cites the decision in *City of Chicago* v. *Sturges*, 222 U.S. 313 (1912) as supporting the proposition that statutes authorizing recovery for riot damages merely effectuate the common law duty of a governmental entity to compensate riot losses and that such statutes do not of themselves create that duty nor are they necessarily prerequisite to judicial recognition of a right to recovery at common law. But the Court in *Sturges* had before it a state statute that imposed absolute liability upon cities to indemnify owners of property for damages occasioned by mobs and riots. In sustaining that statute, the Court held that such a law did not exceed legislative power and looked to the common law, including the statutes of Winchester, only to demonstrate that imposition of liability upon a community was not without historical roots in the common law and was based on reasonable grounds of social policy.[12]

---

[12] The Court in *Sturges* cited particularly:

> . . . a series of statutes, beginning possibly in 1285, in the statutes of Winchester, 13 Edw. I, c. 1, coming on down to the 27th Elizabeth, c. 13, the Riot Act of George I (1 Geo. I, St. 2) and Act of 8 George II, c. 16 . . . 222 U.S. at 322.

D.C. Code § 49-301 (Supp. V, 1972) provides, in pertinent part:

> The common law, all British statutes in force in Maryland on February 27, 1801, the principles of equity and admirality . . . in force in the District of Columbia on March 3, 1901, shall remain in force except insofar as the same are inconsistent with, or are replaced by, some provision of the 1901 Code.

Plaintiff concedes that it can find no evidence that the English statutes mentioned in *Sturges, supra*, were "in force" as statutes in Maryland in 1801. In any event, the rule in this jurisdiction

In holding that an individual citizen has "no substantive right to recover the damages resulting from failure of a government or its officers to keep the peace," *Turner* v. *United States, supra,* 248 U.S. at 358, the Court in *Westminster, supra,* decided that it should not "judicially create for the District, a new principle of municipal responsibility." 140 U.S.App.D.C. at 249, 434 F.2d at 523. The Court noted "the extremely broad scope of policy choices to be made in deciding whether there should be liability and, if so, in formulating the rules," and concluded that it was "appropriate to follow the accepted understanding that liability should be imposed, if at all, by the cognizant legislative body, not by the judiciary acting on its own." *Id.* at 249, 434 F.2d at 523. *Cf. National Board of Young Men's Christian Ass'n* v. *United States, supra,* 395 U.S. at 95-96 (Harlan, J. concurring in the judgment).[13]

---

has been that: "British statutes antedating the Declaration of Independence have almost universally been regarded as having the effect of judicial precedent rather than legislative enactment." *Manoukian* v. *Tomasian,* 99 U.S.App.D.C. 57, 61, 237 F.2d 211, 214 (1956), *cert. denied,* 352 U.S. 1026 (1957); *Association of Western Rys.* v. *Riss & Co.,* 116 U.S.App.D.C. 63, 320 F.2d 785 (1963).

In 1835, Maryland enacted one of the first laws in this country providing for governmental liability for damages caused by riots. In its present form, the statute is found in Article 82, Sections 1-3 of the Annotated Code of Maryland (1957). This statute, however, was not "in force" in 1801 and so does not remain in force in the District of Columbia under D.C. Code § 49-301.

[13] Although not asserted by plaintiff Monarch Insurance Co., three other allegations appear in certain of the actions consolidated for decision with this case. Count II of the complaint of the Insurance Company of North America, Civil Action No. 262-70, alleges that defendants engendered reliance in their ability to defend the property of plaintiff's subrogors, but failed to do so, and in imposing a curfew, prevented plaintiff's subrogors from defending their own property. Such allegations against the United States fall within the discretionary function exception, 28 U.S.C. § 2680(a) or the exception for misrepresentation, 28 U.S.C.

In light of the foregoing, the motion of the United States as to it to dismiss this action for failure to state a claim will be granted. Having reached that conclusion, it is not necessary to consider the alternative motion of the United States for summary judgment and the numerous affidavits and exhibits in support thereof.

II.

Claims Against the District of Columbia and The Named Officials

What has been said above with regard to plaintiff's claims against the United States based upon alleged violations of the Fifth and Fourteenth Amendments and of a common law duty to protect plaintiff's property and to compensate it for losses resulting from civil disorders, applies with equal force to plaintiff's assertion of those claims against the District of Columbia and the named officials who are also defendants in this case.[14]

---

§ 2680(h), of the Federal Tort Claims Act. *United States* v. *Neustadt*, 366 U.S. 696 (1961). Against the District of Columbia, such allegations would not state a cause of action, *Westminster Investing Corp.* v. *G. C. Murphy, supra.*

Paragraph 9 of the complaint of The Home Insurance Company, Civil Action No. 2097-69, and related cases, alleges negligence in failing to alleviate social conditions which were known to lead to riots and disorders. In effect, the government would become an insurer of peace, safety and ideal social order. Such allegations are clearly addressed to the legislative and executive branches of the government and are otherwise barred under the discretionary function exception to the Federal Tort Claims Act and the holding in *Westminster, supra.*

[14] Paragraphs 20 and 21 of the complaint of The Insurance Company of North America, Civil Action No. 262-70, allege that the District of Columbia negligently failed to comply with the provisions of D.C. Code §§ 4-106 and 4-119 (1967). The pertinent

Count I of plaintiff's complaint, which was discussed above with regard to the claims asserted against the United States,[15] alleges a violation by all defendants of plaintiff's rights under 42 U.S.C. § 1983. Because that statute is inapplicable to claims against the United States, there remain to be examined here plaintiff's allegations under § 1983 against the other named defendants.

The question of the potential liability of the District of Columbia and the other named defendants under § 1983, however, has now been settled by the Supreme Court in

---

provision in § 4-106 is: "The Metropolitan Police Force shall consist of not less than three thousand officers and members . . . ."

D.C. Code § 4-119 provides in part:

> It shall be the duty of the Commissioners of the District of Columbia at all times of the day and night within the boundaries of said police district—
>
> First. To preserve the public peace;
> Second. To prevent crime and arrest offenders;
> Third. To protect the rights of persons and property;
> Fourth. To guard the public health;
> Fifth. To preserve order at every public election;
> Sixth. To remove nuisances existing in the public streets, roads, alleys, highways and other places;
> Seventh. To provide a proper police force at every fire, in order that thereby the firemen and property may be protected . . .
>
> Tenth. To enforce and obey all laws and ordinances in force in the District . . . .

No case in this jurisdiction has held either the District or its officials liable for negligent failure to comply with either of the above statutes. Several cases in other jurisdictions have held that such statutes do not give rise to a cause of action in individual citizens when police or fire protection is inadequate. *See, e.g., Steitz* v. *City of Beacon*, 295 N.Y. 51, 64 N.E.2d 704 (1945); *Riss* v. *City of New York*, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968); *cf. Restatement (Second) of Torts*, § 288 (1965). *See also Hart's Food Stores* v. *City of Rochester*, 44 Misc. 2d 938, 939, 255 N.Y.2d 390, 391 (Sup. Ct. 1965).

[15] See note 1, *supra*, and accompanying text.

District of Columbia v. *Carter*, 41 U.S.L.W. 4127 (U.S. Jan. 10, 1973), *rev'g sub nom. Carter* v. *Carlson*, 144 U.S. App. D.C. 388, 447 F.2d 358 (1971). In *Carter* the Supreme Court held that "the District of Columbia is not a 'State or Territory' within the meaning of § 1983" and thus that § 1983 could not form a basis for liability of the District or its officials for alleged deprivations of constitutional rights. 41 U.S.L.W. at 4127, 4131. The Court specifically disclaimed any view on the merits of the case insofar as liability was based on other theories of liability.[16]

Thus, because the decision of the Court of Appeals in *Carter* v. *Carlson* involves important questions with regard to the status of the doctrine of official and sovereign immunity as common law defenses in the District of Columbia, it will still be considered here in some detail.[17] For reasons stated more fully below, however, this Court finds that *Carter* v. *Carlson* is inapplicable to all of the other claims asserted by plaintiff in the present case.

---

[16] 41 U.S.L.W. at 4127 n. 3.

[17] The complaint in *Carter* alleged:

> . . . that in 1968 one police officer Carlson arrested appellant Carter without probable cause in a bar and, as Carter was being held by two other officers, proceeded to beat him with brass knuckles. The complaint further alleged that Carlson's precinct captain, and the Chief of Police, and the District of Columbia each negligently failed to train, supervise, and control Carlson with regard to the circumstances in which (1) an arrest may be made, and (2) various degrees of force may be used in making an arrest.
>
> Carter sought to hold Carlson liable for assault and battery, or for negligence in making an arrest. He sought to hold precinct captain Prete and Police Chief Layton liable for negligence in failing to give Carlson adequate training and supervision. Finally, he sought to hold the District of Columbia liable either for its own negligence in failing to train and supervise Carlson, or for the torts of Carlson, Prete, and Layton on a theory of *respondeat superior*. In each case, he asserted both a common law tort theory of liability, and an action for deprivation of civil rights under 42 U.S.C. § 1983. 144 U.S.App.D.C. at 390-91, 447 F.2d at 360-61.

As to the common law claims asserted by the plaintiff in *Carter*, the Court looked first to the arresting officer and pointed out that:

> An arrest without probable cause constitutes a tort at common law, as does the use of excessive force to make an arrest. And the law is clear that an arresting officer has no immunity from suit for torts committed in the course of making an arrest. 144 U.S.App. D.C. at 392-93. 447 F.2d at 362-63 (footnotes omitted).[18]

But the arresting officer in *Carter* was never found for service of process, and so the Court turned to plaintiff's common law claims against the officer's supervisors and against the District of Columbia.

First, as to the supervisory officials, the Court held that the claim that they were negligent in failing to give the arresting officer adequate training and supervision should not be dismissed on the ground of official immunity unless the officials first established that their responsibilities for training and supervision were wholly discretionary.[19] In determining whether a particular function of the supervisory officials is discretionary, the Court would consider "whether an officer is likely to be unduly inhibited in the performance of that function by the threat of liability for tortious conduct." 144 U.S.App.D.C. at 392, 447 F.2d at 362.[20]

---

[18] See the cases cited by the Court *Id* at 392 n. 8, 393 n. 9, 447 F.2d at 362 n. 8, 363 n. 9.

[19] See cases cited by the Court holding supervisory officers subject to suit, though not always ultimately liable on the merits, *Id.* at 393 n. 12, 394 nn. 14-15, 447 F.2d at 363 n. 12, 364 nn. 14, 15.

[20] See *Barr* v. *Matteo*, 360 U.S. 564 (1959); *David* v. *Cohen*, 132 U.S.App.D.C. 333, 407 F.2d 1268 (1969); *Cf. Spencer* v. *General Hospital*, 138 U.S.App.D.C. 48, 425 F.2d 479 (1969); *Graham* v. *District of Columbia*, 139 U.S.App.D.C. 378, 433 F.2d 536 (1970); *Elgin* v. *District of Columbia*, 119 U.S.App.D.C. 116, 337 F.2d 152

Second, as to the common law claims against the District of Columbia in *Carter*, the threshold question is whether the District is protected from suit by the doctrine of sovereign or governmental immunity.[21] The Court found that since an arresting officer can be subject to liability in tort for false arrest or assault, there is no additional threat to the efficiency of that particular governmental activity in subjecting the District to suit as well as the arresting or supervisory officers. The Court therefore held that the act of making an arrest is *ministerial* rather than discretionary for the purposes of the doctrine of sovereign immunity set forth in *Spencer, supra*.[22] The Court concluded that the District may be vicariously liable for the intentional torts of an arresting officer and the failure of supervisory officers adequately to train and control him.

Should it not be possible, in the circumstances of a given case, to reach the District under a theory of vicarious liability, the District might still be liable directly for negligence in failing adequately to supervise, train and control its police officers. The foundation for such direct liability is the common law duty imposed on the District to supervise, train and control its police officers. The District Court in *Thomas* v. *Johnson*, 295 F.Supp. 1025, 1030-33

(1964). A function is discretionary under *Spencer, supra*, if it is "of such a nature as to pose threats to the quality and efficiency of government in the District if liability in tort was made the consequence of negligent act or omission." 138 U.S.App.D.C. at 51, 425 F.2d at 482.

[21] See cases cited note 20, *supra*. As the Court in *Carter* observed, because the doctrines of sovereign and official immunity serve the same purpose, it is not surprisng that the common law in this jurisdiction has developed the same criteria for both kinds of immunity. 144 U.S.App.D.C. at 397, 447 F.2d at 366.

[22] *Accord, Bivens*, v. *Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 456 F.2d 1339 (2d Cir. 1972), *on remand from* 403 U.S. 388 (1971).

(D.D.C. 1968), cited approvingly by the Court in *Carter*, held that the District of Columbia as a corporate entity has such a duty with regard to its police officers. Again, an ultimate defense to an alleged breach of that duty would be that the activities of the officers were discretionary, but the District enjoys no threshold immunity to such a claim.

None of the holdings in *Carter* as to the potential liability at common law of an arresting officer, his supervisory officers, or of the District itself is applicable to the facts in the present case. It should be noted preliminarily that plaintiff here relies on *Carter* on the assumption that, if the District of Columbia and supervisory police officials could be found potentially liable in *Carter* for the tortious conduct of an officer making an arrest, then conversely similar liability could be found for the *failure* to make arrests. Such a failure to make arrests constitutes the gravamen of plaintiff's claims against the District and the named officials in this case. There is, of course, quite a leap from establishing liability for tortious conduct in the actual execution of an arrest, an activity which the Court in *Carter* declared to be ministerial, and establishing liability for failure to make arrests in controlling a riot, an activity which is pervaded with discretionary choices.

It is not necessary, however, to rely on the distinction between discretionary and ministerial activity or to question the holdings in *Carter* as to the availability of official or sovereign immunity as a threshold defense in order to distinguish *Carter* from the present case. Nothing in *Carter* disturbs the holding in *Westminster, supra,* that the District of Columbia, in the absence of a statute providing otherwise, has no duty to protect citizens from riot damage. The lack of such a duty makes it unnecessary to decide the question of the possible immunity of either the District, its officials or its officers on the street. Indeed, the Court in *Carter* cited *Westminster* precisely on those points, contrasting *Westminster* and *Thomas* v. *Johnson,*

supra, which held that the District as a corporate entity has a duty to supervise, train and control its police officers. 144 U.S.App.D.C. at 398, 447 F.2d at 368. And the Court in *Westminster* clearly addressed itself not only to the question of the duty of the District to protect its citizens from riot damage but also to the question of its duty to train its police in riot control. 140 U.S.App.D.C. at 248, 434 F.2d at 522.

The Court in *Westminster* concluded that appellant therein could prove "no set of facts in support of its claim which would entitle it to judicial relief," *id.* at 252, 434 F.2d at 526, and thus rejected appellant's plea that it be permitted to complete its process of discovery. Likewise here, plaintiff can prove no set of facts which would entitle it to judicial relief against the District or its officials based solely on common law tort theory, and there is thus no reason to deny defendants' motion to dismiss merely on the assumption that some evidence might otherwise be discovered to support plaintiff's claims.

In light of the foregoing, the motions of the defendants, District of Columbia, Walter E. Washington, and John B. Layton, to dismiss this action for failure to state a claim will be granted. An appropriate order is being entered with this opinion.

/s/ WILLIAM B. JONES
Judge

Date: January 22, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Division

Civil Action No. 1152-69

THE MONARCH INSURANCE COMPANY OF OHIO,
a Corporation, 1000 Vermont Avenue, N.W.,
Washington, D.C., *Plaintiff*

v.

DISTRICT OF COLUMBIA, a Municipal Corporation
Serve: Commissioner
14th and E Streets, N.W., Washington, D.C.

UNITED STATES OF AMERICA,
Serve: United States Attorney,
U.S. Courthouse, Washington, D.C.

JOHN B. LAYTON, c/o Metropolitan Police Department,
300 Indiana Avenue, N.W., Washington, D.C.

WALTER E. WASHINGTON, c/o District Building,
14th and G Streets, N.W., Washington, D.C.

JOHN DOE AND MARY DOE, Address Unknown
Washington, D.C.

RICHARD ROE AND MARY ROE, Address Unknown,
Washington, D.C. *Defendants*

COMPLAINT

Filed May 5, 1969

(For Damages Resulting From Riots, Insurrection, Etc.)

Jurisdiction Statement

1. This Honorable Court has jurisdiction because the amount in controversy exceeds Ten Thousand Dollars, ($10,000.00), exclusive of interest and costs, and by virtue of the provisions of the Federal Tort Claims Act, 28 U.S.C.,

§ 1346(b) and § 2671 and by the provisions of 28 U.S.C., § 1343 and § 1346(a)(2), and by virtue of the provisions of Title 1, § 102 and § 901, and Title 11, § 521, D.C. Code, 1967 Edition, and the Constitution of the United States of America.

2. Plaintiff is a corporation duly authorized to do business in the District of Columbia, primarily engaged in writing and issuing Fire, Extended Coverage and other policies of insurance. The Defendants are the District of Columbia, a municipal corporation; the United States of America; John B. Layton, who at all times applicable hereto was Chief of the Metropolitan Police Department, Washington, D.C.; Walter E. Washington, who at all times applicable hereto was Commissioner of the District of Columbia; John Doe, Mary Doe, Richard Roe and Mary Roe, unknown citizens of the United States and residents of the District of Columbia.

3. Notices of the damages and claims forming the bases of this cause of action were served upon the United States of America as required by 28 U.S.C. 2672, and 28 Code of Federal Regulations 14.1, et seq., and to the District of Columbia in accordance with Title 12, § 309, District of Columbia Code, 1967 Edition. Additionally, the Metropolitan Police Department of the District of Columbia made reports of the damages to the property hereinafter set forth, in writing, in the regular course of duty.

COUNT I

1. The Jurisdictional Statement is incorporated herein by reference.

2. Commencing during the late night of Thursday, April 4, 1968, certain civil disturbances, riots, insurrections, fires, pillaging, looting and malicious mischief occurred throughout the District of Columbia and continued for approximately twelve days thereafter, during which time

sundry men, women and children including, but not limited to the Defendants Doe and Roe, gathered and assembled in and throughout the District of Columbia and by mob action did, in a riotous manner, break into and feloniously enter various premises, destroy, wreck, damage, pillage, burn, steal and loot various and numerous private, personal and real property in the District of Columbia including, but not limited to, property located at the addresses set forth in Count X herein. As a further result of the aforesaid, fires and explosions occurred in the District of Columbia causing extensive damage to real and personal property, including, but not limited to, the property listed in Count X herein. As a final result, more than six hundred fifty dwelling units and nine hundred commercial businesses received extensive damage, including the property of Plaintiff's subrogors, all of whom sustained physical damage, and many of whom sustained loss of business, use and occupancy of their premises.

3. During the twelve days aforesaid all Defendants deprived Plaintiff's subrogors of their rights, privileges and immunities secured by the Constitution and laws in violation of 42 U.S.C., § 1983, and are liable for redress of damages therefor.

COUNT II

1. The allegations of Count I are adopted herein by reference.

2. At various and diverse times and places presently unknown to the Plaintiff, both prior to April 4, 1968, and during the twelve days immediately subsequent thereto, the District of Columbia acting through the Defendant Washington, its Commissioner (also referred to as Mayor), its Director of Public Safety, the Defendant Layton, its Chief of Police, its Fire Chief and other agents, servants and employees did formulate and adopt certain plans and programs for public action to be undertaken by the Gov-

ernment of the District of Columbia in the event of a civil disturbance in the nature of a riot, insurrection or rebellion, by large numbers of citizens of the District of Columbia, including, but not limited to, the Defendants Doe and Roe.

3. The formulation and adoption of these secret plans and programs for action in event of such occurrence were considered, made and formulated with knowledge of previous disorders in other large metropolitan cities throughout the United States, and encompassed studies of the various plans and techniques for disturbance control utilized by other cities, including all available statistical data on the number of casualties and deaths resulting from disturbance control.

4, As a result thereof, Defendants, the District of Columbia, John B. Layton and Walter E. Washington, individually and acting through their duly authorized agents and officials, in secret, and without notice to Plaintiff, its subrogors, or other citizens of the District of Columbia, programmed disturbance control as follows:

a. To cordon off all disturbance areas into restricted geographical confines;

b. To permit those engaged in the disturbance to continue without direct interference of the Police, National Guard, Police Reserve, Militia, Fire Department and Army until the disturbance remitted by the volition of those perpetuating the same;

c. To preclude all police and military authorities from the use of deadly force in quelling the disturbances so as to prevent serious injury or death to any person in the disturbance zone, including the active perpetrators and participants in the disorders, such as the Defendants Doe, Roe and others;

d. To permit any and all real and personal property existing in the disturbance zones to be damaged, destroyed *and/or stolen by those engaged in the disturbance.*

5. The plans and programs described above were for the purpose of:

a. Sacrificing the property located within the disturbance zones for the purpose of preventing injury to and/or death of persons in said zones;

b. Containing the damage and destruction in limited zones so that other property owned by private individuals, corporations and Defendants, United States of America and District of Columbia, in various areas of the city would not be damaged, and to sacrifice the property of private citizens within the disturbance zones for that purpose.

6. The Defendants, United States of America and District of Columbia, negligently and selfishly promulgated plans to sacrifice private property located in various areas of the District of Columbia in order that property owned by them would be saved from destruction.

7. On April 4 and 5, 1968, and subsequent thereto, the plans and programs of disturbance control referred to above were ordered into effect by the Defendant, Walter E. Washington, and the Public Safety Director of the District of Columbia, to the end that various and sundry property, including the property listed in Count X herein within the disturbance zones was permitted to be damaged, looted and/or destroyed by the public officials of the District of Columbia during the disturbances aforesaid.

8. All property of Plaintiff's subrogors, more fully set forth hereinafter, was located within the disturbance zones and was damaged, looted and/or destroyed in the service of the protection of the persons and property of the public and of the Defendants, United States of America and the District of Columbia, in implementation of the secret plan for disturbance control.

9. Plaintiff's subrogors had legal and equitable title to present and future enjoyment of the property enumerated in Count X herein, which was required to be forfeited by Defendants, United States of America and the District of Columbia, without judicial proceedings and without specific authority therefor, thus depriving them of their Constitutional rights to own, possess or use their own property free from the arbitrary, capricious and unreasonable acts of the Defendants, United States of America and the District of Columbia, followed for the selfish protection of their own property, or to dispose of the same in the manner judged most consonant to their own happiness.

10. The Plaintiff herein has paid the amounts listed hereinafter to its insureds and is subrogated to the rights of its insureds, the owners of the property so sacrificed to public service. It has demanded from the Defendants, United States of America and the District of Coulmbia, just compensation as required by the Constitution of the United States as a result of the taking by inverse condemnation of all such property hereinafter stated for public use, but despite such demand no compensation has been paid.

COUNT III

1. The allegations of Counts I and II are incorporated herein by reference.

2. The Defendant, United States of America, the District of Columbia, John B. Layton and Walter E. Washington, knew, or in the exercise of reasonable care should have known, that a dangerous and threatening condition existed in the District of Columbia on or before April 4 and 5, 1968, but despite such knowledge:

a. Failed to warn citizens and property owners, including Plaintiff's subrogors, of the impending danger so as to enable them to protect their own property, or to make plans to have other persons protect the property more fully set out in Count X herein;

b. Failed to take adequate precautions to protect the property of the citizens and property owners of the District of Columbia, including Plaintiff's subrogors; and

c. Failed to take adequate precautions to quell the impending disorder so as to prevent the damage and destruction of property, including that of the Plaintiff's subrogors.

3. The Defendants, District of Columbia, John B. Layton and Walter E. Washington, negligently and deliberately failed and refrained from utilizing existing personnel and facilities to prevent and control the disturbance so as to prevent damage and destruction to the property of the citizens and property owners, including Plaintiff's subrogors, as follows:

a. Failed to utilize existing and available police, including police reserve and military personnel;

b. Failed to maintain and utilize existing and available communication systems; and

c. Failed to take all available steps necessary to protect property within the District of Columbia, including that of the Plaintiff's subrogors.

4. The Defendants, United States of America and the District of Columbia, negligently failed to keep their employees at work so as to prevent their joining in the disturbances set forth herein and in allowing them to complicate traffic conditions existing in the District of Columbia.

5. The Defendants, United States of America, the District of Columbia and Walter E. Washington, negligently failed to keep the schools of the District of Columbia in operation so as to prevent students from joining in the disturbances as set forth above, and in complicating the traffic conditions.

6. The Defendants, the District of Columbia, John B. Layton and Walter E. Washington, negligently directed its

agents and employees imposed by law with the duty to preserve public peace, to prevent crime and to arrest offenders, to protect the rights of persons and property, to guard the public health, to provide a proper police force at every fire in order that thereby the firemen and property may be protected, to see that all laws relating to disorderly persons and the public health are promptly enforced, and to enforce and obey all laws and ordinances in force in the District of Columbia, to violate their said Constitutional mandates, statutory requirements and police regulations, or in the alternative negligently failed to direct them to comply with their said public duty.

7. The Defendants, United States of America, the District of Columbia, John B. Layton and Walter E. Washington, adopted programs for disturbance control, including, but not limited to, one known as "Cabin Guard", with a plan to sacrifice private property for the public service of disturbance control, as more fully set forth above, and thereafter negligently kept such plans secret and clandestinely concealed their existence from the public, including Plaintiff's subrogors, from making plans for self-protection and lulling them into a false sense of security.

8. The Defendants, United States of America, the District of Columbia, John B. Layton and Walter E. Washington, negligently failed to control the activities of known revolutionaries, militant activists, and other known agitators after receiving actual and/or constructive notice that such persons were encouraging and inciting the populace to riot and/or revolt.

9. The Defendants, United States of America, the District of Columbia and John B. Layton, failed to provide police and military personnel with adequate mechanical devices for riot control, including gasmasks and tear gas guns.

COUNT IV

1. The allegations of Counts I and II are incorporated herein by reference.

2. The Defendant, United States of America, acted negligently in disbursing and assigning military personnel to deter riotous activities then and there taking place without proper supervision, organization and proper written or oral orders and/or guide lines. The failure of the Defendant, United States of America, to do so was a direct proximate cause of said Federal troop's ineffective and generally disorganized attempts to quell said disorders, and as a result caused the damage and/or destruction of the property of Plaintiff's subrogors.

COUNT V

1. The Plaintiff incorporates herein by reference all allegations of Counts I and II.

2. The Defendants, District of Columbia, John B. Layton and Walter E. Washington, were negligent in disbursing and assigning National Guard members and Metropolitan Police to deter riotous activities then and there taking place, without proper supervision, organization and proper written or oral orders and/or guide lines. Such failure of these Defendants to so properly disburse units of the National Guard and the Metropolitan Police was a direct and proximate cause of the ineffective and generally disorganized attempts of the National Guard and the Metropolitan Police to quell said disorders as aforesaid, and resulted in the destruction of and/or damage to the property of the Plaintiff's subrogors.

3. At all times pertinent hereto the Defendants, District of Columbia, John B. Layton and Walter E. Washington, knowingly, negligently, deliberately and in violation of § 4–106, D.C. Code, 1967 Edition, allowed its Police manpower to be and remain below the minimum number required by statute, thereby precluding them from assigning

adequate police personnel to prevent the widespread damage enumerated herein.

COUNT VI

1. The allegations of Counts I and II are incorporated herein by reference.

2. The Defendants, United States of America, the District of Columbia, John B. Layton and Walter E. Washington, negligently encouraged the President of the United States to delay signing the necessary Proclamation and Executive Order which were a prerequisite to calling out Federal troops to quell the disorders, or negligently failed to communicate the necessity of prompt signing of same when the Defendants knew, or should have known, the same should have been signed earlier.

3. As a result of said failure to sign the Proclamation and Executive Order promptly, when these Defendants knew, or should have known, they should have been signed, the disbursal of troops was delayed until the disorders had grown beyond hope of immediate cessation.

COUNT VII

1. The allegations of Counts I and II are incorporated herein by reference.

2. Plaintiffs state that the Defendant, United States of America, violated Article IV, Section 4, of the Constitution of the United States, in that it failed to protect the District of Columbia and its citizens and property owners from invasion, riot, civil insurrection and domestic violence.

COUNT VIII

1. The allegations of Counts I and II are incorporated herein by reference.

2. The Defendants, United States of America and the District of Columbia, in violation of the Fifth and Four-

teenth Amendments to the Constitution of the United States, did effectively take the property of Plaintiff's subrogors for public use without just compensation and did deprive them of real and personal property without due process of law.

3. The Defendants, United States of America and the District of Columbia, violated the Constitutional rights of Plaintiff's subrogors by denying them equal protection of the laws.

4. The Defendants, United States of America and the District of Columbia, violated the Constitutional rights of Plaintiff's subrogors by abridging their privileges and immunities as citizens of the United States.

COUNT IX

1. The allegations of Counts I and II are incorporated herein by reference.

2. By virtue of the provisions of the Statute of Winchester, 13 Edward 1, Stat. 2, c.2 (1285), reenacted by 28 Edward III, c.2 (1354), and 27 Elizabeth, c.13 (1585), all of which became part of the common law of England, in effect and in existence at the time of the first emigration of inhabitants to the Colony of Maryland at the time of the granting of The Charter of Maryland on June 20, 1632 (Patent Role 8, Charles 1, Part 3, No. 2594) made applicable to the State of Maryland by its Constitution of 1776 and still in force and effect in the District of Columbia by the provisions of Title 49, Section 301, District of Columbia Code, 1967 Edition, Supplement 1 (1968), the citizens of the District of Columbia collectively, and thus the District of Columbia is liable for restitution of damages done to property within its jurisdiction by robberies and felonies committed therein by felons who are unidentified and unapprehended.

COUNT X

1. The allegations of Counts I through IX above are incorporated herein by reference.

2. The defendant, United States of America, has denied all claims of plaintiff's subrogors.

3. By virtue of the aforesaid, plaintiff, The Monarch Insurance Company of Ohio, was required to pay, and has paid, sums of money to each of the named persons and corporations set forth below in the amounts listed for damage and/or destruction of property at the addresses listed, all in Washington, D.C., and has thus become subrogated by contract and by law to each:

Diane Corp. T/A York Furniture Store 3646 Georgia Ave., N.W.	$22,204.97
American Junk Company, Inc. 2266 8th St., N. W.	583.14
James A. Baturin 800 4th St. S. W.	315.00
Daniel Cohen 1942 First St., N. W.	1,000.00
Barry J. Benn T/A Gem Market 1259 K St., S. E.	4,266.29
V. J. Johnson & A. S. Johnson 503 8th St., S. E.	2,953.91
Allan P. Rothbaum 2480 16th St., N. W., Apt. 11	1,000.00
Irving King 6201 16th St., Silver Spring, Md.	1,000.00

M. Mallinoff & N. Canter T/A Carver Food Mart 5575 Central Ave., S.E.	$ 2,632.16
Diane Corp. T/A York Furniture 3608 Georgia Ave., N.W.	3,000.00
Sonia and George Mogen D/B/A Sunny's 304 Riggs Rd., N. E.	9,523.55
Nathan & Ruth B. Simkowitz 3103 15th St., N. W.	11,660.00
Cy Tanner 4522 Benning Rd., S. E.	21,000.00
A. & B. Baraff T/A Herman's Liquors 3712 14th St., N. W.	5,218.43
Diane Corp. T/A York Furniture 600 Newton Place, N. W.	15,000.00
Cy Tanner 4522 Benning Rd., S. E.	18,203.29
Bordow Liquors, Inc. 701 7th St., S. E.	5,898.26
Lucy H. Chaconas 2601-07 14th St., N. W.	10,546.77
Surry's Men's Shop, Inc. 809 H St., N. E.	63,636.62
Benjamin Chasen, Herbert Levinson & I. L. Chasen T/A Post Liquors 800 North Capitol St.	12,273.41
Lawrence Savage Company, Inc. 3216 Penn. Ave., S.E.	40,536.21

Lewis Cohn and Richard Cohn 1231-1239 H St., N.E.	$136,170.55
David Grossman 1704 You St.	239.76
B. & J. Ambrogi T/A Ambrogi's Carry Out 258 Rhode Island Ave., N. W.	119.09
Louis & Ruth Futterman 11209 Markwood Dr., Silver Spring, Md.	105.20
Harry & Mary Lazarus 400 8th St., N. E.	153.41
Estate of Joseph & Fannie Bordow 701 7th St., N. E.	261.39
Lord's Ltd. 3006 14th St., N. W.	331.38
Nathan Goren & Fannie Goren 2263 12th St., N. W.	700.00
Lord's Ltd. 3006 14th St., N. W.	15,634.56
Manuel Grossman & Joseph Rodman T/A Rodman's Mens Store 1830 7th Street, N. W.	723.72
B. E. Hurd Vinetta Fashions Shop 1359 U St., N. W.	318.08
Total	$407,209.15

4. Additionally, the following named insureds have presented claims against the Plaintiff for loss of business and for the loss of use and occupancy of the premises listed and in the amounts listed, all of which claims have been denied by the Plaintiff. Should the Courts subsequently hold the Plaintiff liable for these claims, Plaintiff will be subrogated upon payment thereof and contingently sues the Defendants for an amount sufficient to cover said contingent liability, which amounts will be added by subsequent amendment to the Complaint should it become necessary.

Associated Restaurants, Inc. T/A The Monkey Business 3107 M St., N. W.	$1,314.89
Cellar Door, Inc. T/A Cellar Door 1201 34th St., N. W.	5,625.00
Empress, Inc. T/A The Empress 1018 Vermont Ave., N. W.	4,655.00
Jack's Cafe, Inc. T/A Groovy's Shipwreck 3350 M St., N. W.	2,666.00
Marc Stevens, Inc. T/A Knife & Fork Restaurant 1822 M St., N. W.	10,219.00
3259 M Street, Inc. T/A Crazy Horse 3259 M St., N. W.	6,143.00
Parchey's Restaurant, Inc. 2000 K St., N. W.	5,000.00
Total	$35,622.89

WHEREFORE, Plaintiff sues the Defendants and demands of and from them, and each of them, the sum of Four Hundred Forty-Two Thousand Eight Hundred Thirty-Two Dollars and four cents, ($442,832.04), plus interest and costs.

BRAULT, GRAHAM, SCOTT & BRAULT

By: _____

DENVER H. GRAHAM
1314 19th Street, N. W.
Washington, D.C. 20036
AD-2-1646

Attorneys for Plaintiff

Of Counsel:

JOHN HARRISON BOYLES
506 E Street, N. W.
Washington, D.C.

BRIEF FOR DISTRICT OF COLUMBIA OCT 17
RESPONDENTS IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-246

THE MONARCH INSURANCE COMPANY OF OHIO, *Petitioner*

v.

UNITED STATES OF AMERICA, DISTRICT OF COLUMBIA, ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

C. FRANCIS MURPHY,
Corporation Counsel, D.C.

LOUIS P. ROBBINS,
Principal Assistant Corporation Counsel, D.C.

RICHARD W. BARTON,
Assistant Corporation Counsel, D.C.

DAVID P. SUTTON,
Assistant Corporation Counsel, D.C.

Attorneys for District of Columbia Respondents,
District Building,
Washington, D.C. 20004

INDEX

SUBJECT INDEX

	Page
Counter-Statement of Question Presented	1
Counter-Statement of the Case	2
Reasons for Denying the Writ	3
Conclusion	5

CASES CITED

A. & B. Auto Stores of Jones St., Inc. v. *City of Newark* (1971), 59 N.J. 5, 279 A. 2d 693 3

Amos v. *District of Columbia* (D.C. App., 1973), 309 A. 2d 305 3

Bivens v. *Six Unknown Named Agents of the Federal Bureau of Narcotics* (1971), 403 U.S. 388 4

Fields v. *United States* (1907), 205 U.S. 292 3

Gilligan v. *Morgan* (1973), 413 U.S. 1 4

Jahnke v. *Incorporated City of Des Moines* (Iowa, 1971), 191 N.W. 2d 780 3

Louisiana ex rel. Folsom v. *Mayor and Administrators of New Orleans* (1883), 109 U.S. 285 3

Scheuer v. *Rhodes* (1974), 416 U.S. 232 4

Turner v. *United States* (1919), 248 U.S. 354 3

Westminster Investing Corp. v. *G. C. Murphy Co.* (D.C. Cir., 1970), 434 F.2d 521 3

YMCA v. *United States* (1969), 395 U.S. 85 3,4

RULE OF COURT CITED

Rules of the Supreme Court of the United States
Rule 19 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

THE MONARCH INSURANCE COMPANY OF OHIO, *Petitioner*

v.

UNITED STATES OF AMERICA, DISTRICT OF COLUMBIA, ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR DISTRICT OF COLUMBIA RESPONDENTS IN OPPOSITION

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the District of Columbia, its Commissioner and its Metropolitan Police Chief owe a constitutional duty upon which petitioner, as an insurer of local property owners, can predicate a right to recover compensation for injury and destruction caused by rioting mobs.

COUNTER-STATEMENT OF THE CASE

Petitioner challenges an order of the United States District Court for the District of Columbia entered in a civil action in which petitioner, as the insurer and subrogee of numerous property owners, sought to recover for damage to the property of its insureds emanating from the civil disturbances occurring in the District of Columbia within the 12-day period following the assassination of Dr. Martin Luther King, Jr., in April 1968. Named as defendants were the United States of America (hereinafter "the Federal respondent"), the District of Columbia, the Commissioner of the District of Columbia, and the Metropolitan Police Chief (hereinafter "the District respondents"). (App. 28a-29a.)

In seeking to recover money damages against the District respondents, petitioner alleged generally that these respondents were negligent in formulating plans designed to sacrifice private property to the public service of disturbance control, in failing to adequately preserve the peace and to protect property, in failing to utilize all existing manpower and communication facilities, in failing to warn petitioner's insureds so as to permit them to protect their own property, and in assigning police and National Guard members to various locations in which the riotous activities took place (App. 3a, 27a-37a).

In addition to contending that the District respondents could be compelled to respond in damages on a common law negligence theory, petitioner asserted that the actions of the District respondents gave rise to liability under the Constitution, in that they amounted to a taking of property for public use without just compensation, a denial of due process and equal protection of the law, and an abridgment of privileges and immunities (App. 3a, 37a-38a). Petitioner advanced essentially similar allegations and recovery theories as to the Federal respondent and the case came on before the District Court on the motion of the

District respondents to dismiss the complaint and the motion of the Federal respondent to dismiss the complaint, or, in the alternative, for summary judgment (App. 21a-27a). The District Court dismissed the complaint as to both the District and Federal respondents and filed an extensive opinion in support of its rulings (App. 2a-27a; 353 F. Supp. 1249). The United States Court of Appeals for the District of Columbia Circuit affirmed (App. 1a), and petitioner thereafter filed in this Court a petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

Petitioner advances no ground for review conceivably falling within the standards and considerations governing review on writ of certiorari prescribed by Rule 19 of the Rules of this Court. And see *Fields* v. *United States,* 205 U.S. 292, 296 (1907). In ruling against petitioner, the Court of Appeals upheld the decision of the District Court that a governmental entity and its top level officials owe no duty to compensate property owners for damages caused by rioting mobs. That holding conflicts with no decision of this Court, with no decision of a circuit court of appeals, and with no decision of the highest court of any state. Indeed, all the reported decisions make clear that, in the absence of a statute (not present in the District of Columbia), no such duty exists. See *Louisiana ex rel. Folsom* v. *Mayor and Administrators of New Orleans,* 109 U.S. 285, 287-288 (1883); *Turner* v. *United States,* 248 U.S. 354, 357-358 (1919); *YMCA* v. *United States,* 395 U.S. 85, 94-96 (1969) (concurring opinion of Mr. Justice Harlan); *Westminster Investing Corp.* v. *G. C. Murphy Co.,* 434 F.2d 521 (D.C. Cir., 1970) and authorities cited at 523; *A. & B. Auto Stores of Jones St., Inc.* v. *City of Newark,* 59 N.J. 5, 279 A.2d 693 (1971); *Jahnke* v. *Incorporated City of Des Moines,* 191 N.W. 2d 780 (Iowa, 1971); *Amos* v. *District of Columbia,* 309 A.2d 305 (D.C. App., 1973).

Since as the authorities overwhelmingly make plain, municipal liability for riot damage is uniquely a matter of legislative responsibility, petitioner's thesis that this Court should grant certiorari in order to consider whether the Constitution may be utilized as a duty-creator of last resort in cases of this kind is totally lacking in substance.

None of this Court's decisions on which petitioner relies even remotely suggests a conflict between the decision below and any rule enunciated by this Court. *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974), involved the sufficiency of a complaint *vis a vis* the claims of official immunity of a State's Governor and National Guard officials who allegedly engaged in intentionally reckless, willful and wanton misconduct in connection with shootings *by subordinate National Guard members*. As the decisions of this Court previously cited will readily disclose, the matter of the Government's nonliability for injury inflicted by members of rioting mobs is quite different. It involves neither "specific unlawful conduct by * * * [government] personnel" nor the immunity of a government official from liability for such conduct. Cf. *Gilligan* v. *Morgan*, 413 U.S. 1, 11-12 (1973). On the contrary, it gives rise to a rule whereby there is simply no right to recover, apart from any considerations of official or sovereign immunity. Nor does the question involved here bear any logical resemblance to that involved in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), as petitioner asserts (petition at 11-12). There, this Court held only that federal law enforcement officers who violate the Fourth Amendment by their direct and personal participation in an unlawful arrest or search may be compelled to respond in damages on a constitutional tort theory. Here, in clear contrast, direct personal wrongdoing on the part of government officers is incontrovertibly nonexistent.

While this Court's decision in *YMCA* v. *United States*, *supra*, involved the asserted liability of a governmental entity in the context of riot control, that case plainly does

not support petitioner's theory (petition at 10-11) that a governmental failure to take adequate protective measures during a riot amounts to a compensable taking of property within the purview of the Fifth Amendment and, if anything, supports a contrary rule. See especially concurring opinion of Mr. Justice Harlan, 395 U.S. at 95.

Clearly therefore, petitioner has fallen far short of presenting a question of sufficient substance and importance to justify the exercise of this Court's certiorari jurisdiction.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

C. Francis Murphy,
Corporation Counsel, D.C.

Louis P. Robbins,
Principal Assistant Corporation Counsel, D.C.

Richard W. Barton,
Assistant Corporation Counsel, D.C.

David P. Sutton,
Assistant Corporation Counsel, D.C.

Attorneys for District of Columbia Respondents,
District Building,
Washington, D.C. 20004